83-656

Office Supreme Court, U.S.
FILED
OCT 20 1983
ALEXANDER L. STEVAS,
CLERK

**IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1983**

No. _____

CARIBE TUGBOAT CORPORATION
AND CROWLEY TOWING
and TRANSPORTATION COMPANY,

Petitioners,

vs.

DANIEL T. DUFFY,

Respondent.

---

*Petition for Writ of Certiorari to the
Supreme Court of Florida*

William R. P. Hogan
John J. Walsh
Freehill, Hogan & Mahar
New York, New York

and

James F. Moseley
Toole, Taylor, Moseley
& Joyner
501 West Bay Street
Jacksonville, Florida 32202
(904) 356-1306
Attorneys for Petitioners

QUESTION FOR REVIEW

Whether a state forum in adjudicating a maritime and Jones Act claim must adhere to explicit law established by the Supreme Court of the United States.

LIST OF PARTIES

The parties, with reference to their status at the Trial court are:

1. Petitioners - Caribe Tugboat Corporation and Crowley Towing and Transportation Company, Defendants.

2. Respondent - Daniel T. Duffy, Plaintiff.

TABLE OF CONTENTS

Page

QUESTION FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

REFERENCE TO OFFICIAL REPORTER 1

GROUNDS ON WHICH JURISDICTION IS INVOKED 2

CONSTITUTIONAL PROVISIONS, STATUTES OR CASES INVOLVED 3

STATEMENT OF CASE

I. Facts Material to Consideration of Questions Presented. 4

II. Facts upon which a Federal Question arises. 5

ARGUMENT 6

Argument for Granting Writ:

The Federal Question Raised is substantial: A State forum in adjudicating a maritime and Jones Act claim must adhere to explicit law established by the Supreme Court of the United States.

CONCLUSION 12

CERTIFICATE OF SERVICE 13

APPENDIX CONTENTS

APPENDIX "A" ..... A 1-3

Judgment in the Trial Court

APPENDIX "B" ..... A 4-9

Motion for New Trial

APPENDIX "C" ..... A 10-11

Court's Order denying the Motion for New Trial in the Trial Court

APPENDIX "D" ..... A 12

Transcript page 642

APPENDIX "E" ..... A 13-14

Opinion of the Court of Appeal

APPENDIX "F" ..... A 15

Denial of the Petition for Rehearing in the Court of Appeal

APPENDIX "G" ..... A 16-17

Order from the Supreme Court, (July 26, 1983)

APPENDIX "H" ..... A 18

Table of Contents from Initial Brief of Appellant filed on August 30, 1982 with District Court of Appeal.

TABLE OF AUTHORITIES
CASES

Page

Cazad v. Chesapeake & Ohio Railway Co.,
622 F.2d 72 (4th Cir. 1980) 7, 9

Chelentis v. Luckenbach S.S. Co.,
247 U.S. 372, 38 S.Ct. 501 (1918) 8

Fitzgerald v. United States Lines Co.,
374 U.S. 16, 20, 10 L.Ed.2d 720,
83 S.Ct. 1646 (1963) 8

Garrett v. Moore - McCormack Co.,
317 U.S. 239, 87 L.Ed. 239, 63 S.Ct. 246 (1942) 2

Gianfala v. Texas Co.,
350 U.S. 879, 100 L.Ed.
775, 76 S.Ct. 141 (1955) 10, 11

Grimes v. Raymond Concrete Pile Co.,
355 U.S. 867, 78 S.Ct. 123 (1957), (*cert. granted*),
356 U.S. 252, 2 L.Ed.2d 737, 78 S.Ct. 687 (1958) 10

Jones & Laughlin Steel Corp., v. Pfeifer,
__U.S.__, 76 L.Ed.2d 768, 103 S.Ct.__
(June 1983) 7, 9

Lang v. Texas & Pacific Railway Co.,
624 F.2d 1275 (5th Cir. 1980) 7

Moragne v. States Marine Lines, Inc.
398 U.S. 375, 26 L.Ed.2d 339, 90 S.Ct.
1772 (1970) 8

Norfolk & Western Railway Co. v. Liepelt,
444 U.S. 490, 62 L.Ed.2d 689, 100 S.Ct. 755, *reh. den.*,445 U.S. 972, 64 L.Ed.2d 250, 100 S.Ct. 1667 (1980) . . . 3, 4, 6

O'Byrne v. St. Louis Southwestern Railway Co.,
632 F.2d 1285 (5th Cir., Unit A, 1980) 7

Panama Railroad Co. v. Johnson,
264 U.S. 375, 68 L.Ed. 748, 44 S.Ct. 391 (1924) 7

Sea-Land Services v. Gaudet,
414 U.S. 573, 39 L.Ed.2d 9, 94 S.Ct. 806 (1974) 7

Senko v. Lacrosse Dredging Corp.,
352 U.S. 370, 1 L.Ed.2d 404, 77 S.Ct. 415, *reh. den.*, 353 U.S. 931, 1 L.Ed.2d 724, 77 S.Ct. 716 (1957) 2, 10

Southern Pacific Co., v. Jensen,
244 U.S. 205, 217, 61 L.Ed. 1086, 37 S.Ct. 524, 529 (1917) 8

The Lottawanna,
88 U.S. (21 Wall.) 558, 22 L.Ed. 654 (1874) 8

United States v. Reliable Transfer Co.,
421 U.S. 397, 44 L.Ed.2d 251, 95 S.Ct. 1708 (1975) 8

CONSTITUTIONAL PROVISIONS AND STATUTES

1. U.S. Constitution Article III 3

2. The Jones Act, 46 U.S.C. §688 ..... 3, 4, 7

3. Federal Employees' Liability Act, 45 U.S.C. §§51, et seq. 7

REFERENCE TO OFFICIAL REPORTER

The Citation of the Supreme Court of Florida Case is not, as of the filing of this Petition, available.

The Citation of the First District Court of Appeal is 427 So.2d 227 (Fla. 1st D.C.A. 1983)

The Order and Judgment of the Trial Court, the Circuit Court of the Fourth Judicial Circuit in and for Duval County, Florida is not reported.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The basis of jurisdiction is that a state Court system has decided a federal question in a way to conflict with applicable decisions of this Honorable Court. (Rule 17.1 (c))

The order of the Florida Supreme Court is dated July 26, 1983. (Appendix "A", A 1). The opinion of the intermediate Court is attached (Appendix "E", A 10). The federal question was raised at all levels of Florida Courts. The federal question was that the state forum had disregarded the substantial federal rights of the defendants and the maritime law of damages as pronounced by this Honorable Court.

The statutory authority and supporting citations for such jurisdiction are 28 U.S.C. §1257 and Rule 17.1 (c). The bases for such matter being a federal question are substantial and include, among others:

a) *Garrett v. Moore - McCormack Co.*
317 U.S. 239, 87 L.Ed. 239, 63 S.Ct. 246 (1942)

b) *Senko v. Lacrosse Dredging Corp.*
352 U.S. 370, 1 L.Ed.2d. 404, 77 S.Ct. 415, *reh. den.*, 353 U.S. 931, 1 L.Ed.2d 724, 77 S.Ct. 716 (1957)

The bases upon which jurisdiction is invoked are the Code, Rule, and case citations relied on above. In *Garrett, supra,* the Court states succinctly:

> "So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. Whether it did so raises a federal question reviewable here under §237 (b) of the Judicial Code, 28 USCA §344(b)."

CONSTITUTIONAL PROVISIONS, STATUTES OR CASES INVOLVED

1. United States Constitution, Art. III, §2

2. Section 33 of the Merchant Marine Act of June 5, 1920, commonly referred to as *Jones Act*, 46 U.S.C.A. §688:

RECOVERY FOR INJURY TO OR DEATH OF SEAMAN

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

3. *Norfolk and Western Railway Co. v. Liepelt*, 44 U.S. 490 (1980)

DECISION: State Court's refusal to instruct jury as to non taxability of award is unlawful.

STATEMENT OF THE CASE

I. Facts Material to Consideration of Questions Presented

This action arose from a personal injury sustained by Daniel T. Duffy, a seaman employed by Defendants. Complaint was filed in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida. The Complaint alleged claims under the *Jones Act*, 46 U.S.C.A. §688, *et seq.* and the Maritime Law of the United States.

During the trial and at the settling of the jury instructions, Petitioners - Defendants submitted an instruction as follows:

> "The Court instructs the Jury that in the event you should award compensatory damages to Mr. Duffy in this case, that any award will not be subject to the Federal Income tax and that the Jury should not, therefore, add or subtract taxes in fixing the amount of any award"

The Trial Court although apprised of the decision of *Norfolk and Western Railway Company, v. Liepelt*, 444 U.S. 490 (1980) declined to so instruct and said instruction was denied (transcript page 642; Appendix "D", A 12). The jury returned a verdict in an amount of Four Hundred Thousand Dollars. Judgment was entered thereon. Post Trial relief sought by Petitioner (Appendix "B", A 4-9) brought no relief and Post Trial Motions were denied (Appendix "C", A 10-11). The cause proceeded on appeal from the Circuit Court of the Fourth Judicial Circuit, in and for Duval County Florida, to the District Court of Appeal for the First District, State of Florida, Docket No. AL-489. The Federal question presented at the Trial Court was renewed and presented to the Court of Appeal as to whether the Trial Court had committed error in failing to give the requested *Liepelt* instruction, "a matter of Federal

law." (Appendix "H", A 18). The Court of Appeal held the matter to be error but "harmless." Said opinion is setforth herein (Appendix "E", A 13-14).

Petitioner then sought relief to the Florida Supreme Court upon the issue concerning the determination of a significant aspect of Maritime law, since Courts of Florida were misapplying the maritime law as set forth by the Supreme Court of the United States. In a five-to-two decision the Supreme Court of Florida declined to further hear the case, (Appendix "G", A 16-17). This Petition followed.

II. Facts Upon Which A Federal Question Arises.

This matter is a *Jones Act* and Maritime law case. The Federal question under such law arose when the *Liepelt* instruction was first submitted to the Court and thereafter denied.

The Federal question continued to dominate on the trial level by the Post Trial Motions and decision on Post Trial Motions.

The substantial federal question was submitted to the District Court of Appeal and the Florida Supreme Court directly bringing the issue that Florida forums, both trial and appellate, disregarded the pointed substantial federal question and the fact the failure to give the *Liepelt* instruction was in direct contradiction to the pronouncement of the United States Supreme Court in the *Liepelt* case.

ARGUMENT FOR GRANTING WRIT

THE FEDERAL QUESTION RAISED IS SUBSTANTIAL:

A STATE FORUM ADJUDICATING A MARITIME AND JONES ACT CLAIM MUST ADHERE TO EXPLICIT LAW ESTABLISHED BY THE SUPREME COURT OF THE UNITED STATES.

This Court is petitioned as final recourse to obtain relief from the Florida Courts' manifest disregard of the law as promulgated by this Court — a disregard which threatens the uniformity of maritime law. Recourse here only obtains, because the Florida Supreme Court failed to recognize the importance of the issue and its amenability to summary determination.

The small amount of time necessary to dispose of this issue compared to the enormous harm threatened to the uniformity of the administration of maritime law makes this case a compelling one for certiorari. Failure to accept certiorari will encourage the state courts to fashion their own maritime remedies and will condone blatant "forum shopping."

The disregard of maritime law was so great, the lack of uniformity so grievous and the violation of the fair stream of damages so complete, that granting of this Petition is in order.

In *Norfolk and Western Railroad Co. v. Liepelt*, 444 U.S. 490, 62 L.Ed.2d 689, 100 S.Ct. 755 (1980), this Court held that the jury must be instructed that the award is not subject to income taxation. The reason was apparent and the execution of such law simple. *Liepelt* applies to all maritime personal injury

cases. [1] *Cf. Jones & Laughlin Steel Corp. v. Pfeifer*, __U.S.__, 76 L.Ed.2d 768, 103 S.Ct. __, (1983).

A trial court's failure to charge *Liepelt* to the jury is by no means "harmless." *See Cazad v. Chesapeake & Ohio R.R. Co.*, 622 F.2d 72 (4th Cir. 1980); *O'Byrne v. St. Louis Southwestern Railway Co.*, 632 F.2d 1285 (5th Cir., Unit A, 1980); *Lang v. Texas & Pacific Railway Co.*, 624 F.2d 1275 (5th Cir. 1980). Nonetheless, it has been so characterized by the Appellate Courts of Florida.

At the trial on the case at bar, Petitioner submitted the following Request for Instruction to the judge:

> "The Court instructs the jury that in the event you should award compensatory damages to Mr. Duffy in this case, that any award will not be subject to the Federal income tax and that the jury should not, therefor, add or substract taxes in fixing the amount of any award."

The trial court refused to submit the requested charge, to the jury. (Appendix "D", A 12). The jury returned a verdict of $400,000 in favor of plaintiff who had sustained a fractured ankle, whose medical expenses were paid, whose temporary wage loss was minimal, who was working at the time of the trial, and whose earnings, at the time of trial, exceeded his pre-accident wages. Post-trial motions for new trial and remittitur were denied.

Admitting the trial court's failure to charge *Liepelt* was error, the intermediate Appellate Court held it to be "harmless" and affirmed. By a 5-2 vote the Florida Supreme Court denied a petition for writ of certiorari.

The *Liepelt* decision was a balancing of fairness. It was a statement by the United States Supreme Court that

[1] The *Federal Employees' Liability Act*, 45 U.S.C. §§51, *et seq.* is incorporated into the Jones Act, 46 U.S.C.A. §688; *Panama Railroad Company v. Johnson*, 264 U.S. 375, 68 L.Ed. 748, 44 S.Ct. 391 (1924); *Sea-Land Services v. Gaudet*, 414 U.S. 573, 39 L.Ed.2d 9, 94 S.Ct. 806 (1974).

employees such as the Plaintiff herein, who come within Federal protection of various employee acts have rights, *but* correspondingly all parties to the litigation have rights. This court recognized that such a pronouncement would take little time to do, would avoid any confusion, and would be fair.

We respectively submit that the Court below in the instant case disregarded this concept and allowed the case to go to the jury without this critical and well recognized instruction.

The Courts below, in denying the requested instruction, in denying the Motion for a New Trial, and in denying relief in the appellate process, disregarded the clear charted requirements of the law. The lower Court, in abandoning the clear reasoning and holding of *Liepelt, supra,* disregarded the law of the land.

It is mandatory for the Courts below to give this fair instruction that is not prejudicial to either side, since it is merely a clear statement of the law. We encourage this Court, and submit to this Court that the cause as to damages should be remanded for a new Trial with fair instructions. The *Liepelt* instruction, requested but not given herein, is a fair instruction.

This Court has been quick to intervene and correct the application of state law where there is a clear, established rule in maritime law. *Cheientis v. Luckenbach S.S. Co.,* 247 U.S. 372, 38 S.Ct. 501 (1918). [2] The Court should do so here. [3] The

[2] As old as the history of this Republic is the maxim that the admiralty and maritime law must be uniform and not the province of the several states. *The Lottawanna,* 88 U.S. (21 Wall.) 558, 22 L.Ed. 654 (1874). The danger to a disjointed maritime law has been often recognized: "(F)reedom of navigation between the states and with foreign countries would be seriously hampered and impeded." *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 217, 61 L.Ed. 1086, 37 S.Ct. 524, 529 (1917).

[3] The Court has led in formulating fair and uniform remedies in the law maritime. *Fitzgerald v. United States Lines Co.,* 374 U.S. 16, 20, 10 L.Ed.2d 720, 83 S.Ct. 1646 (1963) and *United States v. Reliable Transfer Co.,* 421 U.S. 397, 44 L.Ed.2d 251, 95 S.Ct. 1708 (1975). Nowhere is the formulating of fair and uniform concepts in the law maritime more prevalent than damages in personal injury cases. In *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375, 26 L.Ed.2d 339, 90 S.Ct. 1772 (1970), this Court recognized a right to recover for wrongful death that sought "uniform vindication of federal policies" that would remove discrepancies arising from accommodation of state applications.

Florida Court has attempted to circumvent the law of this Court by characterizing the admitted error as "harmless." To countenance the state's actions in this case only encourages further intrusions into this Court's application of maritime law. Some examples of possible further intrusions into the uniformity of the administration of maritime law include disregard of other mandated charges to the jury; variances of the rules of the standard of care under the *Jones Act*; destruction of the neatly balanced rules for determining whether a jury trial is required.

Uniformity was not so much as given any regard. The Florida treatment of the *Liepelt* Rule is even more unfair and more irregular when one considers it is applied in Federal forums in the same geographic region. Federal Courts confronted with the same circumstances as the instant case apply the *Liepelt* Rule. Cases have been reversed on damages and remanded to the Trial court by Courts of Appeal. *Cazad, O'Byrne,* and *Lang, supra.* Thus there is no uniformity, absolutely. There is only a disregard of the *Liepelt* Rule of this Court, and the dire consequences to this Court's concept of fairness.

The disregard of *Liepelt* is even more glaring in light of *Jones & Laughlin Steel Corp., v. Pfeifer,* __U.S.__, 76 L.Ed.2d 768, 103 S.Ct. __ (June 1983). This Court overturned the Third Circuit's application to a longshoreman's case of the Rule of the Pennsylvania Supreme Court that in measuring damages, the discount on future earnings should be deemed totally offset by inflation. The "relevant stream of damages" was contemplated by this Court. This Court contemplated that the award was tax free. *Id.* at 76 L.Ed.2d at 781. The Court also contemplated from the *Liepelt* Rule that the jury would not know that the award was tax free.

Failure to correct the Florida Court's ruling in this case encourages the most blatant attempts at "forum shopping." If the state court does not charge *Liepelt* and the federal court does, plaintiffs will "flock" to the state forum. But other,

future deviations by Florida Courts from this Court's interpretation of the maritime law could equally reverse the flow back to federal courts. For example, a state court's denial of a jury trial in a maritime case where a federal court provides for a jury trial on the same case would send plaintiffs scurrying to the federal courts.

To say that the Appellate Court's acknowledgement of error will thwart future abuses ignores what happened here. If a trial judge wants to "lean" towards a maximum recovery for plaintiff, the judge need do no more than refuse to charge *Liepelt* with the assurance that the error will be held "harmless" by the Appellate Courts.

This Court should treat this matter as it has in past, similar matters.

This Court need not spend a great deal of time disposing of this case. Petitioner seeks a "summary disposition on the merits" under Rule 23.3 of the United States Supreme Court Rules, as this court has previously done in maritime cases, where lower courts have failed to follow this Court's ruling on seamen's status.

There was a time when a recurring issue arose in *Jones Act* cases to wit: whether what constituted seaman status was a jury issue. Such issues were repeatedly raised, *e.g. Senko v. Lacrosse Dredging Corp.*, 352 U.S. 370, 1 L.Ed.2d 404, 77 S.Ct. 415, *reh. den.*, 353 U.S. 931, 1 L.Ed.2d 724, 77 S.Ct. 716 (1957) on procedural aspects quite similar to this instant case.

Similarly, in *Grimes v. Raymond Concrete Pile Co.*, 355 U.S. 867, 78 S.Ct. 123 (1957), when the District Court directed a verdict in favor of defendant on plaintiff's seaman status, this Court granted the petition for a writ of certiorari and the "case (was) transferred to summary calendar." *Id.* In a later per curiam opinion, this Court reversed the Court of Appeals' holding, since the District Court should have sent the case to the jury. *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252, 78 S.Ct. 687 (1958).

We submit that *Gianfala v. Texas Co.*, 350 U.S. 879, 100

L.Ed. 775, 76 S.Ct. 141 (1955), is also in point. This Court granted the Petition for writ of certiorari and reversed the judgement all at one time, without argument, in a memorandum case. Such is needed here.

The enforcement of lucid pronouncements of this Court is the issue. Did the Supreme Court of the United States direct lower courts to give the *Liepelt* jury instructions or not? Of course it did. The Petitioner has been raising the point of the fairness and uniformity of this Rule from the beginning. No forum has cured this wrong. No forum was concerned about the fairness of the Rule or this Court's mandate. We urgently request this Court to enforce its Rule of Law.

CONCLUSION

Return this cause to the state forum. The decision should be summarily reversed. There should be acceptance of this Petition for Writ of Certiorari *without argument* with remand on the basis that fairness, uniformity and the martime rule making of this Court demand that basic damage instructions must be given by *trial courts*. Such enforcement of the decisions of this Honorable Court is necessary to keep the stream of damages in maritime cases in concert with the laws of the United States and pronouncements of this Court.

WILLIAM R. P. HOGAN
JOHN J. WALSH
FREEHILL, HOGAN
& MAHAR

and

TOOLE, TAYLOR, MOSELEY
& JOYNER

By James F. Moseley
JAMES F. MOSELEY
501 West Bay Street
Jacksonville, Florida 32202
(904) 356-1306

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Mr. Robert L. Cowles, Cowles, Coker, Myers, Schickel & Pierce, P.A., at Post Office Box 1860, Jacksonville, Florida 32201 by United States Mail this 19th day of October, 1983.

James F. Moseley

JAMES F. MOSELEY
Toole, Taylor, Moseley
& Joyner
501 West Bay Street
Jacksonville, Florida 32202

Attorneys for Petitioners,

Caribe Tugboat Corporation and
Crowley Towing and
Transportation Company,

IN THE CIRCUIT COURT, OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 80-5794-CA

DIVISION: "I"

DANIEL T. DUFFY,

Plaintiff,

vs.

CARIBE TUGBOAT CORPORATION and CROWLEY TOWING and TRANSPORTATION COMPANY,

Defendants.

FINAL JUDGMENT

This cause having been tried before a jury, and the jury having returned a verdict as follows:

"VERDICT"

WE, the Jury, return the following verdict.

1) Was there negligence on the part of the Defendants, CARIBE TUGBOAT CORPORATION and CROWLEY TOWING AND TRANSPORTATION COMPANY, which was a legal cause of damage to the Plaintiff, DANIEL T. DUFFY?

YES X NO _____

2) Did the Defendants, CARIBE TUGBOAT CORPORATION and CROWLEY TOWING AND TRANSPORTATION COMPANY, breach their duty to furnish a seaworthy vessel to the Plaintiff, and, if so, was the breach a legal cause of damage to the Plaintiff, DANIEL T. DUFFY?

YES X NO _____

If your answers to questions 1 and 2 are both NO, your verdict is for the Defendant, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to *either* question 1 or 2 is YES, please answer question 3.

3) Was there negligence on the part of the Plaintiff, DANIEL T. DUFFY, which was a legal cause of his injury?

YES _____ NO X

If your answer to question 3 is YES, please answer question 4. If your answer to question 3 is NO, skip question 4 and answer question 5.

4) State the percentage of any fault, which was a legal cause of damage to the Plaintiff, DANIEL T. DUFFY, that you have charged to:

Defendants, CARIBE TUGBOAT CORPORATION and CROWLEY TOWING AND TRANSPORTATION COMPANY _____%

Plaintiff, DANIEL T. DUFFY _____%

Total must be 100 %

Please answer question 5.

5) We find the total damages sustained by the Plaintiff, DANIEL T. DUFFY, to be *$400,000.00.*

In determining the total amount of damages, do not make any reduction because of the negligence, if any, of the Plaintiff, DANIEL T. DUFFY. If you have found the Plaintiff, DANIEL T. DUFFY, negligent in any degree, the Court, in entering judgment, will reduce the Plaintiff's total amount of damages (100%) by the percentage of negligence which you found chargeable to the Plaintiff.

SO SAY WE ALL this *26th* day of February, 1982:

/s/ BILLY J. HUNTER
Foreman or Forewoman

it is

ORDERED AND ADJUDGED that the Plaintiff, DANIEL T. DUFFY, recover the sum of $400,000.00 for which let execution issue. Costs will be taxed on Motion of the parties.

ORDERED in Chambers in Jacksonville, Duval County, Florida, this *1st* day of March, 1982.

/s/ GORDON A. DUNCAN, JR.
Circuit Judge

Copies Furnished To:

Robert L. Cowles, Esq.
Post Office Box 1860
Jacksonville, FL 32201

James F. Moseley, Esq.
1000 Barnett Bank Building
Jacksonville, FL 32202

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 80-5794-CA

DIVISION: "I"

DANIEL T. DUFFY,

Plaintiff,

vs.

CARIBE TUGBOAT CORPORATION and CROWLEY TOWING and TRANSPORTATION COMPANY,

Defendant.

MOTION FOR NEW TRIAL, JUDGMENT NOT WITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE FOR REMITTITUR

COME NOW the Defendants, CARIBE TUGBOAT CORPORATION and CROWLEY TOWING and TRANSPORTATION COMPANY, by and through their undersigned attorneys, and pursuant to the Florida Rules of Civil Procedure, herewith move the Court to set aside the Verdict and Final Judgment entered thereon on March 1, 1982 and enter Judgment not withstanding verdict or, in the alternative, for remittitur on the following grounds:

1. The verdict is contrary to the law.

2. The verdict is contrary to the evidence.

3. The verdict is contrary to the law and the evidence.

4. The verdict is contrary to the manifest weight of the evidence.

5. There is no evidence that the Defendants were guilty of negligence.

6. The evidence affirmatively shows that the sole proximate cause of Plaintiff's injury and damage was the negligence of Plaintiff DUFFY.

7. The evidence affirmatively shows that Plaintiff DUFFY was guilty of negligence which caused or contributed to causing Plaintiff's injury and damage.

8. There is no evidence that the Defendants, CARIBE TUGBOAT CORPORATION and CROWLEY TOWING and TRANSPORTATION COMPANY, were guilty of negligence which was a proximate cause of Plaintiff's injury and damage.

9. The Court erred in denying Defendant's Motion to Direct a Verdict in its favor at the close of Plaintiff's case.

10. The Court erred in denying Defendant's Motion to Direct a Verdict in its favor at the close of all the evidence.

11. There is no sufficient or substantial evidence pending to support the jury's verdict.

12. It affirmatively appears from the verdict that the jury disregarded their oath as jurors and arbitrarily and capriciously refused to render a verdict on the testimony and law given by the Court.

13. The Verdict is clearly excessive and not supported nor sustainable by the evidence.

14. The Court erred in giving Plaintiff's Requested Jury Instruction No. 17 as follows:

"In your consideration of the Plaintiff's claims of negligence and unseaworthiness, you are instructed that a seaman does not assume the risk inherent in carrying out the orders of his superior, nor is he contributorily negligent for carrying out those orders, for there is an obligation on the part of the seaman to obey orders given by his superiors."

15. The Court erred in refusing to give Defendants' Requested Jury Instruction No. 20 as follows:

"An injured party is under legal obligation to mitigate his damages, that is, to minimize the economic loss resulting from his injury, by resuming gainful employment as soon as such can reasonably be done. He may recover damages for lost earnings, and for the loss of the ability to earn money in the future, but is precluded from the recovery to the extent that he could have earned wages in the past and to the extent that he has the ability to earn money in the future."

16. The Court erred in refusing to give Defendants' Requested Jury Instruction No. 23 as follows:

"The Court instructs the Jury that in the event you should award compensatory damages to Mr. Duffy in this case, that any award will not be subject to the Federal Income Tax and that the Jury should not, therefore, add or subtract taxes in fixing the amount of any award."

* * *

* * *

19. In the alternative, Defendants would move the Court for a remittitur of the Verdict of FOUR HUNDRED THOUSAND AND NO/100 DOLLARS ($400,000.00) as damages to Plain-

tiff to an amount not exceeding TWO HUNDRED THOUSAND AND NO/100 DOLLARS ($200,000.00). As grounds for this request for remittitur, Defendants would respectfully show that the United States Supreme Court in *Norfolk and Western Railway Company v. Leipelt*, 444 U.S. 490, 62 L.Ed.2d 689, 100 Sup.Ct. 755 (1980) ruled that the State Trial Court erred in refusing to instruct the jury as to the non-taxability of any damage award. Obviously, since the jury was not instructed in this regard prior to reaching their verdict and assessment of damages in this case, they presumably felt that such an award would be subject to Federal Income Tax or other taxes. Therefore, since such an award is clearly within the 50% bracket, Defendants would request a remittitur of the damage amount as found by the jury to the sum of TWO HUNDRED THOUSAND AND NO/100 DOLLARS ($200,000.00).

Respectfully submitted,

TOOLE, TAYLOR, MOSELEY & JOYNER

By /s/ JAMES F. MOSELEY
JAMES F. MOSELEY
1000 Barnett Bank Building
Jacksonville, Florida 32202
904/356-1306

Attorneys for Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the following addressee by *hand*, this *5th* day of march, 1982:

ROBERT L. COWLES, ESQUIRE
1108 Blackstone Building
Jacksonville, Florida 32202

Attorneys for Plaintiff.

/s/ JAMES F. MOSELEY
ATTORNEY

IN THE CIRCUIT COURT, IN AND FOR
DUVAL COUNTY, FLORIDA.

CASE NO. 80-7594-CA

DIVISION: "I"

DANIEL T. DUFFY,

Plaintiff,

v.

CARIBE TUGBOAT CORPORATION and CROWLEY TOWING AND TRANSPORTATION COMPANY,

Defendants.

ORDER

THIS CAUSE come on to be heard upon Motions of Defendant, CARIBE TUGBOAT CORPORATION and CROWLEY TOWING and TRANSPORTATION COMPANY, for a new trial, judgment notwithstanding the verdict, or in the alternative for remittitur; and the Court having heard argument of counsel and being further advised in the premises, it is,

ORDERED AND ADJUDGED:

That said motion shall be and the same is hereby denied.

DONE AND ORDERED in Chambers, at Jacksonville, Duval County, Florida, this 12th day of April, 1982.

/s/ GORDON A. DUNCAN, JR.
CIRCUIT JUDGE

Copies:

Robert L. Cowles, Esquire
COWLES, COKER, MYERS, SCHICKEL
& PIERCE, P.A.
Post Office Box 1860
Jacksonville, Florida 32201

James F. Moseley, Esquire
TOOLE, TAYLOR, MOSELEY & JOYNER
1000 Barnett Bank Building
Jacksonville, Florida 32202

THE COURT: . . . (s)o I decided I wouldn't give 23.

MR. BUBB: All right. And now we are arguing on mine, I guess.

THE COURT: And then you handed me something. Here I've got three of yours here.

MR. BUBB: I'll take them all back except that one then, Judge. That will be easier.

THE COURT: There's two of them. I think I have three. Okay. These are opposites. This is net and that's gross.

MR. BUBB: That's been our problem.

MR. COWLES: Why don't we just leave it for jury argument?

THE COURT: Okay. We will just leave it for the jury.

MR. BUBB: If I can just make it plain on the record, Your Honor, I would object that — to the Court's refusal to charge that the damages are not subject to the income taxes as required by Liepelt.

THE COURT: Okay. Let's go on.

24.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE
REHEARING MOTION AND DISPOSITION THEREOF
IF FILED.

CASE NO. AL-489

CARIBE TUGBOAT CORPORATION, and CROWLEY
TOWING and TRANSPORTATION COMPANY,

Appellants,

vs.

DANIEL T. DUFFY,

Appellee.

Opinion filed February 14, 1938.

An appeal from the Circuit Court for Duval County
Gordaon A. Duncan, Jr., Judge.

James F. Moseley of Toole, Taylor, Moseley & Joyner,
Jacksonville, for Appellants.

Robert L. Cowles and Daniel C. Shaughnessy of Cowles,
Coker, Myers, Schickel & Pierce, Jacksonville, for Appellee.

PER CURIAM.

Appellant seeks rversal of a jury award based upon the trial court's failure to instruct the jury as to the non-taxability of the award pursuant to the judicially stated rule of *Norfolk and*

Western Railway Company v. Liepelt, 444 U.S. 490, 100 S.Ct. 7775, 62 L.Ed.2d 689 (1980). We concede that *Liepelt* requires the instruction on the non-taxability of the award be given, therefore it was error to fail to do so. However, considering the evidence presented and the relative amount of the award, we find it was harmless error under the circumstances of this case.

Accordingly, the trial court's final judgment is AFFIRMED.

SHIVERS, WENTWORTH AND JOANOS, JJ. CONCUR.

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32301
Telephone No. (904) 488-6152
Date: March 18, 1983
CASE NO. AL-489

CARIBE TUGBOAT CORPORATION, et al

Appellant/Petitioner

vs.

DANIEL T. DUFFY

Appellee/Respondent

ORDER

Motion for rehearing DENIED.

By Order of the Court
RAYMOND E. RHODES, CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

James F. Moseley, Esquire, Jacksonville, Florida
Daniel C. Shaughnessy, Esquire, Jacksonville, Florida
Robert L. Cowles, Esquire, Jacksonville, Florida

/s/ CATHERINE RANEU
DEPUTY CLERK

SUPREME COURT OF FLORIDA

TUESDAY, JULY 26, 1983

DISTRICT COURT OF APPEAL, 1st DISTRICT - NO. AL-489

CASE NO. 63,480

CROWLEY TOWING and TRANSPORTATION COMPANY and CARIBE TUGBOAT CORPORATION,

Petitioners,

vs.

DANIEL T. DUFFY,

Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ALDERMAN, C.J., ADKINS, OVERTON, McDONALD and EHRLICH, JJ., Concur BOYD and SHAW, JJ., Dissent

cc: Hon. Raymond E. Rhodes,
Clerk
Hon. S. Morgan Slaughter,
Clerk
Hon. Gordon A. Duncan, Jr.,
Judge

James F. Moseley, Esquire
of Toole, Taylor, Moseley
& Joyner
Daniel C. Shaughnessy, Esquire
of Cowles, Coker, Myers,
Schickel & Pierce

A True Copy
TEST:
Sid J. White
Clerk Supreme Court.

By: /s/ Dubbie Causseax
DEPUTY CLERK

TABLE OF CONTENTS

Page

A. STATEMENT OF THE CASE 2

B. STATEMENT OF THE CASE 3

ISSUES 9

POINT I. WHETHER THE COURT COMMITTED REVERSIBLE ERROR IN FAILING TO GIVE THE REQUESTED INSTRUCTION REGARDING INCOME TAX IN A JONES ACT CASE, 46 U.S.C. §688, A MATTER OF FEDERAL LAW 11

* * *

* * *